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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 17,2002

Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: Notice of Ex Parte Comments – 2 Originals filed in the proceeding captioned:

***In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-92, 96-98 and 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20,2001).**

Madam Secretary:

On November 14, 2002, the following NARUC Commissioners participated in a conference call with Chairman Powell, Christopher Libertelli, Bill Maher and other members of the Chairman's staff::

(1) NARUC President and Michigan Commissioner David Svanda
(2) NARUC Telecommunications Committee Chair and Oregon Commissioner Joan Smith
(3) NARUC Telecommunications Vice Chair and Michigan Commissioner Bob Nelson
(4) District of Columbia Chairman Angel Cartagena
(5) New York Commissioner Torn Dunleavy
(6) Iowa Chairman Diane Munns
(7) North Carolina Chair Jo Anne Sanford
(8) Florida Chair Lila Jaber
(9) Alaska Chair Nan Thompson
(10) Maine Commissioner Tom Welch, and
(11) North Dakota Commissioner Tony Clark

NARUC General Counsel Brad Ramsay also participated on the call. During that conference call, in response to a question from Chairman Powell, there was a very brief discussion of the State's arguments as outlined in NARUC's pleadings filed in the above-captioned CC Docket 01-92 proceeding.

Another specific item of discussion raised was exactly what the Statute requires with respect to State authority and the State role with respect to adding to or subtracting from the list. More specifically, the question was discussed as to if the 1996 Act specifically requires State ability to add to the list of unbundled network elements (UNEs) or whether the State ability to add is strictly limited by the "consistent with" terms of the exemption in § 251(d)(3).

During this very general discussion, a few general points concerning possible legal arguments vis-à-vis the State authority question were raised. The following narrative covers those points.

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The Structure and History of the Act Indicates States Should Continue to be able to Add to Any National List.

When considering what Congress intended the State role in implementing the 1996 legislation to be, an examination of the overall structure of the Act is instructive. On the related issue of pricing of UNEs, the Supreme Court laid out the standard in *AT&T Corp. v. Iowa Utilities Board,* U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). The Court was very clear that while the FCC had the responsibility for defining the relevant cost standard, it is the *State* commissions that implement the standard when setting wholesale prices for UNEs (47 U.S.C. § 252(d)(1)). The FCC cannot establish a cost standard so strict that the standard effectively sets the wholesale price.[1] Unquestionably, Section 252 of the 1996 Act gives the States the right and the latitude to set wholesale prices constrained only by the necessarily general forward-looking cost framework established by the FCC (*i.e.,* TELRIC).

A similar statutory division of authority applies to what network elements are unbundled. It is significant that the 1996 Act gives the FCC authority only to establish a *minimum* list of unbundled elements – a necessary conclusion from the structure and history of the Act. *Section 251(d)(3) of the **1996** Act explicitly provides the State commissions with the authority to establish unbundling obligations above and beyond the FCC's national minimums, so long as those obligations are consistent with the purposes of the Act.*[2] Aside from an implicit recognition of the value of State experimentation, and the desirability of leaving the States with some ability to manage the transition from the existing State regulatory overlays, this section was necessary because quite a few States had already begun to promote competition by mandating unbundling well before the 1996 Act passed. In fact, many States, including Illinois[3] and Texas[4], have mandated unbundling explicitly pursuant to State statutes. Significantly, during its most recent examination of this issue, the FCC essentially agreed, finding the States can freely expand the list. In terms of the legal options available, the recent remand decision, in outlining the need for more granular market based reviews, buttresses this view of the Act.

NARUC respectfully requests that the Commission grant any waivers needed to file this ex parte out-of-time. If you have questions about this filing, please do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Sincerely,

James Bradford Ramsay
General Counsel

cc: William Maher, *Wireline Competition Bureau Chief*

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1 *See id.*, 525 U.S. at 423 ("The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in §252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates."); *accord Sprint* v. *FCC,* 274 F.3d 549 **(D.C.** Cir. 2001).

2 In 1996, when the FCC tried to construe the language of § 251(d)(3) to prohibit state unbundling rules allegedly inconsistent with the FCC's regulations, the 8" Circuit reversed. The court held § 251(d)(3) was meant "to shield state access and interconnection orders from FCC preemption." *Iowa Utilities Board,* 120F.3d at 807.

3 *Illinois Public Utilities Act* §§ 5/13-505.6; 514; and 801.

4 *Texas Utilities Code* §§ 60.021-022.